Nos. 82-1630 and 82-6695

In The

Supreme Court of the United States

October Term, 1983

TED S. HUDSON,
v. *Petitioner,*
RUSSELL THOMAS PALMER, JR.,
Respondent.

and

RUSSELL T. PALMER, JR.,
v. *Cross Petitioner,*
TED S. HUDSON,
Cross Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF ON BEHALF OF PETITIONER

GERALD L. BALILES
Attorney General of Virginia
WILLIAM G. BROADDUS*
Chief Deputy Attorney General
DONALD C. J. GEHRING
Deputy Attorney General
PETER H. RUDY
Assistant Attorney General
Supreme Court Building
101 North 8th Street
Richmond, Virginia 23219
(804) 786-2071
Counsel for Petitioner and Cross Respondent
**Counsel of Record*

QUESTIONS PRESENTED

1. Does a prison inmate have a reasonable expectation of privacy in prison so that he is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures?

2. If a prisoner, in the context of a prison cell search, is not protected by the specific terms of the Fourth Amendment, can such protection be found under the general terms of the Fourteenth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

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OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States District Court for the Western District of Virginia, Abingdon Division, entered on November 17, 1981, is not reported and is included in the Joint Appendix at pp. 28-34. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued January 6, 1983, is reported at *Palmer* v. *Hudson,* 697 F.2d 1220 (4th Cir. 1983), and a copy appears at pp. 36-44 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court for issuing the writ of certiorari in this case is grounded on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section One of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Title 42 U.S.C. § 1983 (1981) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On September 16, 1981, prison authorities conducted a shakedown search for contraband in the cell occupied by Russell T. Palmer at the Bland Correctional Center. Palmer was incarcerated at Bland because his probation for forgery, uttering, and grand larceny convictions had been revoked after he was convicted on bank robbery charges.

Palmer alleged in his *pro se* suit, filed pursuant to 42 U.S.C. § 1983, that during the course of the September 16 search certain of his property was intentionally destroyed in an effort to harass him. Additionally, he alleged that the search itself was not routine and was planned and carried out solely for harassment purposes. Palmer also alleged that on September 17, 1981, he was again harassed by Hudson, a prison correctional officer, and that he suffered disciplinary action as a result of Hudson's placement of a false charge against him.

By an Order of November 17, 1981, the District Court accepted Palmer's allegations as true and found that they did not rise to the level of a constitutional deprivation. Accordingly, the District Judge granted Hudson's motion for summary judgment and dismissed the complaint. Palmer appealed.

The Court of Appeals affirmed in part, holding that under *Parratt* v. *Taylor*, 451 U.S. 527 (1981), due process is not violated when a state official intentionally deprives

an individual of property if the state provides an adequate post-deprivation remedy. (App. p. 37).

The Court of Appeals also reversed in part, remanding the cause to the District Court because the Fourth Circuit found that Palmer had a Fourteenth Amendment "limited privacy right" which shielded him from "arbitrary and oppressive invasions of personal security." (App. pp. 42, 44.) The Court of Appeals held that if a prisoner questions the validity of a search, prison authorities must prove that adequate grounds existed to justify the search. The court ruled that the search would be an impermissible intrusion on the privacy rights of the prisoner unless prison officials could either prove that the search was done pursuant to an established program of conducting random searches of single cells or groups of cells reasonably designed to deter or discover the possession of contraband, or prove that a reasonable basis existed for the belief that the prisoner possessed contraband. (App. p. 43, 44.) In such a situation the court would award the prisoner "at least nominal damages."

This Court granted the prison guard's Petition for a Writ of Certiorari to consider the applicability of the Fourth Amendment to prison cell searches. Subsequently, the Court granted respondent's Cross Petition for a Writ of Certiorari to consider the scope and meaning of this Court's holding in *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

SUMMARY OF ARGUMENT

In order to invoke the protections of the Fourth Amendment, a person must have a legitimate expectation of privacy. Prior decisions of this Court have strongly suggested that a person confined in a jail or similar facility retains no reasonable expectation of privacy; thus, the Fourth Amendment provides no protection for such a per-

son. Courts have recognized that institutional security considerations justify retraction of those constitutional rights inimical to prison administration.

In order to stem violence and other forms of criminal activity, prison officials must be afforded wide-ranging discretion in employing security measures which will both control and protect inmates. Society, the courts, and the prisoners themselves demand a decent living environment for inmates. The most effective way to meet this goal is through the use of random prison searches which help ferret out weapons, drugs, contraband and other items which could be misused. Retention of Fourth Amendment rights by prisoners is inconsistent with the close and constant monitoring of inmates necessary to preserve institutional security. Accordingly, this Court should establish the "bright line" rule that a prisoner has no legitimate expectation of privacy in prison, and that the Fourth Amendment does not extend to prison cell searches.

The Court of Appeals inexplicably found that Palmer had a substantive right of privacy emanating from the Fourteenth Amendment that was not linked to the Fourth Amendment. This Court has recognized that the Fourteenth Amendment guarantees a substantive right to fundamental personal privacy—but only in limited circumstances. No decision of this Court, however, has intimated that an inmate has a right to privacy from searches and seizures other than any rights that may be afforded him by the Fourth Amendment.

Assuming, *arguendo*, that the Fourth Amendment applies to a prison cell search, the Court of Appeals erroneously held that once the validity of a search is questioned by an inmate, the burden of proof shifts to prison officials to establish the propriety of the search. This holding is in

contravention of the well-established general principle that the burden of proof initially rests with the plaintiff. There is no reason in logic or law to reallocate the burden of proof under the facts of this case. Furthermore, the court's holding will most likely only increase the load of an already overburdened court system by presenting to inmates the prospect of forcing prison officials to respond to—and indeed to disprove—their unproven allegations.

Finally, assuming *arguendo*, that the Fourth Amendment applies to a prison cell search, the search in question was reasonable. The governmental interest in prison security outweighs whatever privacy interest an inmate might retain for Fourth Amendment purposes.

ARGUMENT

I.

The Fourth Amendment Does Not Extend To A Search By Prison Authorities Of A Cell Occupied By An Inmate.

A.

The Fourth Amendment Only Applies When There Is A Reasonable Expectation Of Privacy.

The Fourth Amendment carries "a rich historical background rooted in American, as well as English, experience." 1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 1.1, at 3 (1978) [hereinafter LaFave, *Treatise*] (quoting J. Landynski, *Search and Seizure and the Supreme Court*, ch. 1 (1966)). In England, protections similar to those afforded by the Fourth Amendment were historically directed against the Crown. William Pitt eloquently addressed the thrust of these protections when he stated:

> The poorest man may, *in his cottage*, bid defiance to all the force of the Crown. It may be frail; its roof may

> shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

1 LaFave, *Treatise* § 1.1, at 4 (citing N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 49-50 (1937)) (emphasis added).

In American colonial times, the writ of assistance was used by customs officers to enter and search buildings for smuggled goods. 1 LaFave, *Treatise* § 1.1, at 4. Substantial criticism was voiced shortly after our Constitution was ratified because it failed to proscribe arbitrary searches and seizures. Thereafter, President Washington urged the addition of a bill of rights which would include protection against unreasonable searches and seizures.

In *Boyd* v. *United States*, 116 U.S. 616 (1886), the Supreme Court's early landmark decision regarding search and seizure, the Court linked the Fourth and Fifth Amendments by indicating that there existed no substantial difference between compelling the production of evidence and self-incrimination. Later, the Court shifted the type of analysis given Fourth Amendment cases to a property-oriented view which focused on whether a trespass had occurred on a person's property. *See Olmstead* v. *United States*, 277 U.S. 438 (1928); *Goldman* v. *United States*, 316 U.S. 129 (1942). The evolution of Fourth Amendment doctrine continued in *Silverman* v. *United States*, 365 U.S. 505 (1961), in which the Court adopted a "constitutionally protected area" rationale. There the Court stated that its decision did "not turn upon the technicality of a trespass upon a party wall as a matter of local law," *id.* at 512, and that "Fourth Amendment rights [were] not inevitably

measurable in terms of ancient niceties of tort or real property law," *id.* at 511.

In *Katz* v. *United States*, 389 U.S. 347 (1967), this Court rejected the prior property-oriented view of the Fourth Amendment and held that the interest protected by the Amendment hinges upon the existence of a reasonable expectation of privacy rather than upon an invasion of rights associated with property. The case concerned whether the police, by attaching a listening device to the outside of a public telephone booth and recording Katz's conversation while inside, had violated his Fourth Amendment rights. The Court rejected the "constitutionally protected" area analysis and embraced the proposition, first enunciated in *Katz*, that "the Fourth Amendment protects people, not places." 389 U.S. at 351.

Justice Harlan's concurring opinion in *Katz* set forth the seminal conceptual framework for determining whether a person has a reasonable expectation of privacy.[1] Justice Harlan asserted that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " 389 U.S. at 361 (Harlan, J., concurring). This language remains today the foundation for Fourth Amendment analysis, but the twofold requirement has been distilled into

[1] As the Court stated in *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979), "[T]his Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *See also Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978); *id.* at 150-51 (Powell, J., concurring); *id.* at 164 (White, J., dissenting); *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977); *United States* v. *Miller*, 425 U.S. 435, 442 (1976); *United States* v. *Dionisio*, 410 U.S. 1, 14 (1973); *Couch* v. *United States*, 409 U.S. 322, 335-36 (1973); *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion); *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968); *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968).

the general inquiry: Does the person invoking the Fourth Amendment protection have a legitimate expectation of privacy?

Consistent with recent Fourth Amendment decisions, *Illinois* v. *LaFayette*, 51 U.S.L.W. 4829 (U.S. June 20, 1983); *Illinois* v. *Gates*, 51 U.S.L.W. 4709 (U.S. June 8, 1983); *New York* v. *Belton*, 453 U.S. 454 (1981), this Court must now establish a "bright line" test that prison officials can readily apply in day-to-day prison operations. "A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" 453 U.S. at 454 (quoting LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 Sup. Ct. Rev. 127, 141).

This case presents the Court the opportunity to confirm that which was strongly implied in *Lanza* v. *New York*, 370 U.S. 139 (1962), and *Bell* v. *Wolfish*, 441 U.S. 520 (1979): A prisoner is not entitled to Fourth Amendment protections in prison.

B.

THE PARAMOUNT INTERESTS OF PRISON SECURITY AND INTERNAL ORDER WHICH ARE INHERENT IN A PRISON SETTING ABROGATE ANY REASONABLE EXPECTATION OF PRIVACY WHICH AN INMATE MAY CLAIM, MAKING THE FOURTH AMENDMENT INAPPLICABLE BEHIND PRISON WALLS.

In two recent cases, this Court has touched upon, but left open, the question of whether an inmate retains any Fourth Amendment rights in a prison setting. In *United States* v. *Edwards*, 415 U.S. 800, 808 n.9 (1974), the Court stated: "We thus have no occasion to express a view

concerning those circumstances surrounding custodial searches incident to incarceration which might 'violate the dictates of reason either because of their number or their manner of perpetration.'" (quoting *Charles* v. *United States*, 278 F.2d 386, 389 (9th Cir.), *cert. denied*, 364 U.S. 831 (1960)). Likewise, in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court found it unnecessary to reach the present issue because the Court assumed, without deciding, that inmates retained some diminished Fourth Amendment rights. Nevertheless, in that case, the Court readily upheld the searches in question. 441 U.S. at 556, 558.

The genesis of the proposition that the Fourth Amendment does not apply to a prison search is found in *Lanza* v. *New York*, 370 U.S. 139 (1962). Justice Stewart, writing for the plurality, expressed the view that a public jail is not the equivalent of a person's home for Fourth Amendment purposes. The Court there upheld the surreptitious electronic interception of a jail inmate's conversation with his brother. In addressing the Fourth Amendment question, Justice Stewart said:

> But to say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. . . . Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. *In prison, official surveillance has traditionally been the order of the day.*

Id. at 143 (emphasis added).

While the above-quoted language in *Lanza* was dictum, its conceptual vitality was recognized in *Bell* v. *Wolfish*, 441 U.S. at 556-57. There the Court, referring to *Lanza*, said: "It may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person." In *Bell*, the Court upheld the most intrusive type of searches, *i.e.*, anal and genital inspections, without requiring prison officials to justify such searches with probable cause or even reasonable suspicion.

As noted earlier, *Bell* simply assumed, *arguendo*, that the Fourth Amendment applied to the facts of that case. One can hardly read *Bell*, however, without recognizing the obvious importance the Court placed upon prison security considerations in resolving the Fourth Amendment issues presented. The Court plainly recognized that security considerations significantly outweigh any minimal privacy rights which even *pretrial* detainees might arguably retain. The Court specifically noted that "[l]awful incarceration brings about the necessary *withdrawal* or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." 441 U.S. at 545-46 (emphasis added). Moreover, the Court stressed that maintaining institutional security and preserving order and discipline are essential correctional goals that may require limitation or *retraction* of any arguably retained constitutional rights of both convicted prisoners and pretrial detainees. *Id.* at 546.

Central to all other correctional goals is the institutional consideration of internal security. In response to a survey on prison violence, forty-one states reported that, in 1981, seventy-three inmates had been murdered by other inmates;

in addition, the Federal Bureau of Prisons reported fifteen inmate murders. For the first half of 1982, thirty inmate homicides were reported from the states and five from the federal system. *Prison Violence*, VII Corrections Compendium No. 8, 1 (1983). Twenty-nine riots or disturbances were reported in the same systems from July 1, 1981, to June 30, 1982. *Id.* The Serious Incident Report Statistics of the Virginia State Penitentiary, from 1979 through the first quarter of 1983, showed 134 inmate assaults on other inmates, 7 homicides, 102 inmate assaults on prison staff, and 61 fires. These statistics are not surprising given the often violent nature of many inmates and their desire to obtain contraband such as drugs, money and weapons.

Prison officials must, as the Court recognized in *Bell*, 441 U.S. at 547, be free to take appropriate action to ensure the safety of inmates and prison personnel and to prevent escape or unauthorized entry. Prison administrators must, therefore, be accorded wide-ranging deference in the adoption and execution of policies and practices which, in their judgment, are needed to preserve internal order and discipline. *Id.* This Court noted in *Bell* that even when an institutional restriction infringes upon a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in light of the central objective of safeguarding institutional security. *Bell*, 441 U.S. at 547 (citing *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1977)).

Petitioner well recognizes that under the Court's holding in *Wolff* v. *McDonnell*, 418 U.S. 539, 555-56 (1974), prisoners should be accorded those constitutional rights which are not inimical to prison administration or security. "There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 555-56. Nevertheless, in

recounting in *Wolff* the constitutional rights retained by prisoners, this Court did not once mention the Fourth Amendment or in any other manner suggest that Fourth Amendment rights were retained by prisoners. *Id.* at 556. The Court recognized that there must be some "mutual accommodation between institutional needs and objectives and the [particular] provisions of the Constitution that are of general application." *Id.* Accordingly, in *Wolff*, it was not surprising that the Court held that prisoners had certain due process rights because the state itself had provided a statutory scheme for good conduct credit time and had also specified that such time was to be forfeited only for serious misbehavior. Most significantly, according prisoners such rights does not detract from essential prison security.

The holdings of *Bell* and *Wolff* harmonize easily. Inmates retain constitutional rights, such as religious freedom, access to the courts, protection from cruel and unusual punishment and protection from invidious discrimination based on race, because these rights do not interfere with institutional security. To the contrary, exercise of these rights may be deemed to promote institutional security by easing the daily burdens inmates face in a necessarily regimented, restrictive setting. Retention of privacy rights, on the other hand, would substantially encroach upon the security of prisons and prisoners by unnecessarily impeding prison officials as they seek to prevent breaches of prison security.

In *Marrero* v. *Commonwealth*, 222 Va. 754, 284 S.E.2d 809 (1981), the Supreme Court of Virginia foresaw a crippling effect on security if inmates retained privacy rights. Citing *Bell*, the Virginia court found that the retention of any Fourth Amendment rights by prisoners would be inconsistent with the close and constant monitoring of

inmates necessary to preserve an institution's security. *Id.* at 755-56, 284 S.E.2d at 811. The Virginia Supreme Court acknowledged that prisons are not absolutely secure, and that no one method of searching can eliminate the possession of contraband by prisoners and the security danger it presents. The court then held:

> For one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation. Random searches of inmates, individually or collectively, and their cells and lockers are valid and necessary to ensure the security of the institution and the safety of inmates and all others within its boundaries. This type of search allows prison officers flexibility and prevents inmates from anticipating, and thereby thwarting, a search for contraband. Such searches may be conducted by prison authorities without notice, and in the absence of probable cause or specific information that contraband is present. Marrero's locker afforded him a right of privacy in relation to other inmates, but not as to prison security officers.

222 Va. at 757, 284 S.E.2d at 811.[2]

This Court should not hesitate to adopt the *Marrero* rule as its "bright line" test. As set forth in *Katz*, no Fourth

[2] *Accord United States* v. *Hitchcock*, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *Christman* v. *Skinner*, 468 F.2d 723 (2d Cir. 1972); *Gettleman* v. *Werner*, 377 F. Supp. 445 (W.D. Pa. 1974); *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D.N.H. 1973); *Robinson* v. *State*, 312 So. 2d 15 (Miss. 1975); *State* v. *Brotherton*, 465 P.2d 749 (Or. App. 1970). *But see United States* v. *Hinckley*, 672 F.2d 115, 129-32 (D.C. Cir. 1982); *United States* v. *Lilly*, 576 F.2d 1240, 1244-47 (5th Cir. 1978); *United States* v. *Stumes*, 549 F.2d 831, 831-32 (8th Cir. 1977) (per curiam); *Bonner* v. *Coughlin*, 517 F.2d 1311, 1315-17 (7th Cir. 1975), *aff'd on rehearing*, 545 F.2d 565 (1976) (en banc), *cert. denied*, 435 U.S. 932 (1978).

Amendment protection exists unless the person claiming its protection can establish a reasonable expectation of privacy. Historically, official surveillance has been the order of the day in prison. It is the rule, not the exception. From the moment a convict enters a prison, he knows that he will be watched. Prison cells are designed so that guards can easily view the occupants. Prison guards are instructed to patrol the cell areas regularly.[3] Shower areas are generally open so that guards may observe the inmates. Guards stand watch while prisoners eat, use recreational facilities, work at their jobs and go to school. At many prisons, inmates must get written authorization to enter buildings other than their cell buildings. "It is . . . certain that a prison cell is not a place where the occupant can expect privacy or a place where he can expect to be free from search and seizure unless accompanied by a warrant." *Robinson* v. *State*, 312 So. 2d 15, 18 (Miss. 1975). It is simply unrealistic to suggest that an inmate should reasonably expect to carry the Fourth Amendment in his pocket when he passes through the prison gate.

The discussion to this point has focused primarily on security measures as a necessary means of control over those confined in prisons. However, security measures serve not only a control purpose; they also help the state meet its obligations to provide a decent living environment for inmates.

Once the state lawfully exercises authority to confine an

[3] The need for continuous surveillance of prisoners has been stressed by a number of experts, including the American Correctional Association, which recommends in its *Standards for Adult Local Detention Facilities* (2d ed. 1981) that written policy and procedure require that all high and medium security inmates be personally observed by a correctional officer at least every thirty minutes, but on an irregular schedule. More frequent observation is recommended for certain other types of inmates.

individual for violation of its criminal laws, it must assume the responsibility of assuring that the conditions of that confinement do not constitute cruel and unusual punishment. *See Pugh* v. *Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman* v. *Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds sub nom. Alabama* v. *Pugh*, 438 U.S. 781 (1978). The state may not expose a committed individual to living conditions which are barbarous, which shock the conscience, or which are inconsistent with contemporary standards of decency. *Rhodes* v. *Chapman*, 452 U.S. 337 (1981); *Trop* v. *Dulles*, 356 U.S. 86, 99-101 (1958).

Courts have specifically delineated the types of harms against which inmates must be protected. A prisoner has a constitutional right to be reasonably protected from the constant threat of violence and sexual assault from his fellow inmates. *Hewitt* v. *Helms*, 103 S. Ct. 864 (1983); *Woodhous* v. *Virginia*, 487 F.2d 889 (4th Cir. 1973). Where a pervasive risk of harm is present in a prison, the constitutional prohibition against cruel and unusual punishment requires that prison officials exercise reasonable care to provide protection from unreasonable risks of harm. *Withers* v. *Levine*, 615 F.2d 158 (4th Cir. 1980). Negligence by prison officials in the performance of their duty of care may be a violation of a constitutional right and actionable under 42 U.S.C. § 1983. *Id.* Similarly, in *Smith* v. *Wade*, 103 S. Ct. 1625 (1983), this Court held that a reckless failure to protect an inmate from an obvious danger of assault may justify an award of punitive damages in a § 1983 action.

Clearly the cases cited above reveal that society has placed the burden on prison administrators to be responsible for maintaining internal order and discipline, and for

securing their institutions against unauthorized access or escape. Additionally, penal authorities have the Herculean task of maintaining the physical security and well-being of violent and dangerous criminals. The most effective means of accomplishing this task is through the use of prison searches to eliminate weapons and contraband.

If both society and inmates expect prison officials to protect prisoners from excessive violence, it inevitably follows that both society and inmates expect prison officials to use appropriate means to discharge that obligation. Thus, there is no basis for the contradictory argument that society should recognize a prisoner's claim of privacy while demanding that officials protect violent men from one another.

If this Court were to hamstring prison officials by requiring that, as a condition to a lawful search, they prove either an organized plan for random searches or a reasonable basis for believing that an individual possesses contraband, as the Fourth Circuit required below. The precarious balance between institutional tranquillity and chaos would surely suffer. This is precisely the point made by the Virginia Supreme Court in *Marrero*. Only the naive would suggest that ingenious prisoners would not find a way to discover the institution's random search plan and thereby avoid its operation. Furthermore, imposing a "reasonable suspicion" requirement ignores the fact that prison officials must deal with those who have already shown a proclivity towards illegal conduct. Unlike ordinary citizens who are cloaked with the presumption of innocence, felons such as Palmer have already been convicted of at least one serious crime. If prison officials must delay action until "reasonable suspicion" develops, they face the increased risk that an always potentially dangerous situation may erupt.

Moreover, searches related to security can involve more

than efforts to discover just drugs and obvious weapons. Prison officials must vigilantly seek to find items which are not inherently contraband, for example, items which can be used to escape (floor plans or maps), which can be converted into weapons (kitchen utensils), which can be used to start cell fires (lighter fluid), or which can be used to create health hazards (insecticides). Yet, the Fourth Circuit would apparently lump all these types of searches together under the rubric of "shakedown searches" and impose proof of either an "organized random plan" or "reasonable belief" standard before prison officials could step in to prevent potential disaster.

While all agree that prisoners should not be harassed or abused, the Fourth Circuit has simply overreacted to the allegations of one convicted felon who, as the District Court points out in its opinion, could have sought redress in the state courts for any improper conduct by prison officials.[4] (App. p. 31.) The court has turned the Fourth Amendment on its head and converted it into a tort claims act. Security is unjustifiably sacrificed upon the altar of *allegata*, and it is entirely likely that the ones who will suffer most if this decision stands are the prisoners whose security would be threatened. Quite plainly, the Court of Appeals ignored the fact that this Court has admonished the lower federal courts not to interject themselves into prison administration absent violations of fundamental con-

[4] If this Court holds that the Fourth Amendment does not extend to a prison cell search, prisoners are not left without redress on those occasions where prison officials conduct searches that are intended to harass or abuse them. In Virginia, relief may be obtained by filing suit under various tort theories or through the Virginia Tort Claims Act as embodied in Va. Code §§ 8.01-195.1 *et seq.* Additionally, relief could be sought under 42 U.S.C. § 1983 by proving a violation of the Eighth Amendment's proscription against cruel and unusual punishment.

stitutional rights. *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974).

Petitioner strongly urges this Court to recognize the obvious: the importance of prison security considerations abrogates any reasonable expectation of privacy on the part of an inmate. Accordingly, this Court should hold that the Fourth Amendment does not apply in a prison setting.

II.

An Expectation Of Privacy Cannot Be Found In The General Terms Of The Fourteenth Amendment.

The Fourth Amendment right to privacy in the search and seizure context is applied to the states by the Due Process clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961). By its own terms, however, the Fourteenth Amendment does not address search and seizure or an inmate's right to privacy. Citing *Delaware* v. *Prouse*, 440 U.S. 648 (1979), the Fourth Circuit inexplicably attempted in this case to find an independent Fourteenth Amendment right to privacy not linked to the Fourth Amendment. (App. p. 42.) Yet *Prouse* uses the Fourteenth Amendment only as a conduit to apply the Fourth Amendment to state action.

This Court has recognized that the Fourteenth Amendment guarantees a substantive right to fundamental personal privacy, but only in limited circumstances involving intimate personal relations. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (marriage); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (contraception); *Roe* v. *Wade*, 410 U.S. 113 (1973) (abortion); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (birth control); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (sterilization).

No such fundamental right, however, is involved in this case. In the prison setting, an inmate has no right to privacy with respect to searches and seizures other than any right that may be afforded him by the Fourth Amendment. This Court has never held, except in the area of fundamental personal liberty, that the Fourteenth Amendment contains an independent right to privacy. To the extent that the Court of Appeals predicated its holding upon the prisoner's "Fourteenth Amendment right to privacy" (App. p. 37), it committed clear error, and its judgment should be reversed.

III.

Assuming, *Arguendo*, That The Fourth Amendment Extends To A Prison Cell Search, The Court Of Appeals Impermissibly Shifted The Burden Of Proof To Prison Officials To Prove The Reasonableness Of The Search Before The Prisoner Made A Prima Facie Case.

The court below indicated that prisoners should be accorded some protection from abusive searches. The court held that once "the validity of the search is questioned," prison authorities must "prove that adequate grounds existed to justify the search," either by proving that the search was done pursuant to an established program of conducting random searches or by proving that some reasonable basis existed for the belief that the prisoner possessed contraband.[5] (App. p. 43.) The Court of Appeals thereby improperly places the burden of proof upon prison officials

[5] Should this Court find that the Fourth Amendment does not apply to prison searches, then this issue is moot. If, however, a limited Fourth Amendment right does exist, Arguments III and IV should be considered by the Court even though not specifically raised in the petition. The issues raised in Arguments III and IV have a significant bearing on how this case should be resolved if petitioner does not prevail on the two stated issues.

when prisoners merely question the validity of a search.[6] (App. p. 43.) Thus, even if this Court extends the Fourth Amendment to a prison cell search, it should still reverse that portion of the decision below which impermissibly shifted the burden of proof to prison officials.

Generally, the burden of proof in civil cases "rests upon the party asserting [a disputed fact or issue]." 9 J. Wigmore, *Evidence* § 2489 n.2, at 301 (Chadbourn rev. 1981) (quoting *Miller* v. *Kruggel*, 165 Kan. 435, 439, 195 P.2d 597, 599 (1948)). The rationale for placing the burden of proof upon the plaintiff is that it is the plaintiff who "seeks to change the present state of affairs and who therefore *naturally* should be expected to bear the risk of failure of proof or persuasion." V. Ball, R. Barnhart, K. Brown, G. Dix, E. Gellhorn, R. Meisenholder, E. Roberts & J. Strong, *McCormick's Handbook of the Law of Evidence* § 337, at 786 (2d ed. 1972) (emphasis added). Not until the plaintiff establishes a prima facie case does the burden shift to the defendant. 9 J. Wigmore, *Evidence* § 2494 n.2, at 379. *See Delaware Coach Co.* v. *Savage*, 81 F. Supp. 293, 296 (D. Del. 1948).

Civil rights cases in which plaintiffs allege deprivations of constitutional rights are treated no differently. *See, e.g., Whitsel* v. *Southeast Local School District*, 365 F. Supp. 312 (N.D. Ohio 1972), *aff'd*, 484 F.2d 1222 (6th Cir. 1973). In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), this Court held that "[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. . . . The burden then must shift to the [defend-

[6] It is unclear from the court's decision whether allegations of harassment contained in the pleadings suffice to shift the burden of proof to prison officials or whether an affidavit from the inmate is the triggering device.

ant]. . . ." Later, the Court recognized the "general principle that *any* Title VII plaintiff *must* carry the initial burden of offering evidence adequate to create an inference that [the defendant's] employment decision was based on a discriminatory criterion illegal under the Act." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977) (emphasis added).

Indeed, this general principle has been applied in 42 U.S.C. § 1983 actions, *see Tagupa* v. *Board of Directors*, 633 F.2d 1309, 1312 (9th Cir. 1980); *see also Adams* v. *McDougal*, 695 F.2d 104, 106 (5th Cir. 1983); *McClure* v. *Cywinski*, 686 F.2d 541, 545 (7th Cir. 1982), including § 1983 suits brought by prisoners. *See, e.g., Jones* v. *Franzen*, 697 F.2d 801, 803 (7th Cir. 1983) (reasonableness of prison policy relevant only after prisoner establishes "prima facie case of violation of his constitutional rights"); *Palmigiano* v. *Mullen*, 491 F.2d 978, 980 (1st Cir. 1974) (burden to "show with convincing particularity" that prison classification board violated its own regulations); *Berry* v. *Schmidt*, 341 F. Supp. 1025, 1026 (W.D. Wis. 1972) (prisoner had burden of showing regulation was "arbitrary and unreasonable").

These cases indicate that, contrary to the holding of the Court of Appeals below, rather than the initial burden being placed on prison officials to prove that adequate grounds existed to justify a "questioned" prison search, the burden is first properly placed on the plaintiff to establish that the search complained of has violated some constitutional right, in this case the Fourth Amendment. At that point, and at that point only, should prison authorities be required to go forward with evidence which establishes the reasonableness of the search. Certainly, a prisoner's mere conclusory allegation is inadequate to shift to prison offi-

cials the burden of proving that the search was permissibly motivated and conducted in a reasonable manner.

Shifting the burden to corrections officials upon allegations of Fourth Amendment violations would ill serve the ends of justice in another way: it would undoubtedly increase the burden on our already overloaded courts. Prisoners' suits form a very large part of that load—one that will continue to increase if prisoners are encouraged to file suit by the prospect of forcing prison officials to disprove baseless allegations. Justice Powell in *Parratt* v. *Taylor* wrote:

> Professor Whitman [Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5 (1980)] noted, for example, that civil rights petitions by state prisoners in federal court increased from 218 cases in 1966 to 11,195 in 1979. *Id.*, at 6. See also the Annual Report of the Director of the Administrative Office of the U. S. Courts 62 (1980), reporting a further increase in this number to 12,397 in 1980. The societal costs of using this statute for a purpose never contemplated are high indeed:
>
> "First, the existence of the statutory cause of action means that every expansion of constitutional rights [through § 1983] will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend our most significant rights. Second, every [such] expansion . . . displaces state lawmaking authority by diverting decision-making to the federal courts." Whitman, *supra*, at 25.
>
> The present case, involving a $23 loss, illustrates the extent to which constitutional law has been trivialized, and federal courts often have been converted into small-claims tribunals. There is little justification for making such a claim a federal case, requiring a decision by a district court, an appeal as a matter of

> right to a court of appeals, and potentially, consideration of a petition for certiorari in this Court. It is not in the interest of claimants or of society for disputes of this kind to be resolved by litigation that may take years, particularly in an overburdened federal system that never was designed to be utilized in this way.

451 U.S. at 554-55 n.13 (Powell, J., concurring).

The court's holding below is patently unfair and unwarranted. It turns time-honored trial practice principles upside down and affords to inmates an advantage not available to other civil litigants. He who has the burden must carry it. Prison officials must not be forced to prove their "innocence" simply because an inmate challenges the validity of a cell search by filing a complaint.

IV.

Assuming, *Arguendo*, That The Fourth Amendment Extends To A Prison Cell Search, The Search In Question Was Reasonable And Should Be Upheld.

As reflected in the District Court's opinion, the court accepted as true all of Palmer's allegations[7] and held that Palmer had failed to state a claim cognizable under 42 U.S.C. § 1983. (App. p. 33.) Accordingly, the parties had no occasion to present, and the District Court had no occasion to consider, evidence of legal authorities regarding the applicability of the Fourth Amendment to a prison cell search. Nonetheless, this Court should not hesitate to uphold the search in question.

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[7] In his *pro se* complaint, Palmer alleged that during a shakedown search of his cell Hudson had destroyed certain items of personal property, that Hudson had brought a false charge against him before the prison disciplinary committee, and that Hudson had engaged in a pattern of harassment against him, as evidenced by the first two allegations.

The essential purpose of the Fourth Amendment is to impose a standard of "reasonableness" on the actions of governmental officials in order to insure the individual's legitimate expectations of privacy and the security of the individual against capricious invasions. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). Thus, if the Amendment is extended to prisoners, the propriety of prison officials' actions is measured by balancing the invasion of an inmate's Fourth Amendment interests against the promotion of legitimate governmental interests. *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Delaware* v. *Prouse*, 440 U.S. 648 (1979).

No decision of this Court suggests that a search conducted in a prison should be gauged by the same standards as one conducted in the "free world." Indeed, in *Bell* v. *Wolfish* this Court only assumed—but did not decide—that both convicted prisoners and pretrial detainees retain some Fourth Amendment rights when committed to a correctional facility. Nevertheless, in that case, the Court approved both room searches and body cavity searches of pretrial detainees. The Court held that significant and legitimate institutional security interests outweighed the privacy interests of the inmates. Furthermore, the Court recognized the inherent necessity of rational security measures in prisons to combat the smuggling of money, drugs, weapons and other contraband. 441 U.S. at 559.

In fact, the Fourth Circuit's decision in the instant case recognizes and adopts the position taken by the Court in *Bell*, 441 U.S. at 557, that irregular, unannounced shakedown searches of prison property are permissible, for they are an effective way of insuring that inmates do not possess contraband. (App. p. 42.) The Fourth Circuit's decision further recognizes that "[b]ecause of the legitimate demands of prison security, and to a lesser extent a prisoner's dimin-

ished expectation of privacy, neither a warrant nor probable cause is a prerequisite to a search or seizure in prison." (App. p. 42) (footnote omitted). The court concluded that "the device [of employing random individual searches] is of such obvious utility in achieving the goal of prison security that we do not think that the risk [of harassment] outweighs the benefit." (App. p. 43) (footnote omitted). In light of the court's own language, it is difficult, at best, to understand how the court reached the conclusion it did.

This Court has recognized the security considerations peculiar to prisons in other cases. The Court has held that courts must heed the warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974). "The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." *Meachum* v. *Fano*, 427 U.S. 215, 229 (1976). Additionally, this Court has noted that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974).

As acknowledged by both this Court in *Bell*, 441 U.S. at 560, and the Fourth Circuit in this case (App. p. 42-43), valid security measures can be abused by prison officials to the detriment of inmates. Yet, the need to protect inmates from abuse does not warrant constitutional creativity of the magnitude engaged in by the Court of Appeals. A

remedy does not spring from the Fourth Amendment. Other remedies provide the needed protection.[8]

The governmental interest in prison security clearly outweighs any privacy interest an inmate might retain for Fourth Amendment purposes. Accordingly, the search in question was reasonable and should be upheld.

CONCLUSION

This Court has observed that whether an institution is called a "jail, a prison, or a custodial center, . . . [l]oss of freedom of choice and *privacy* are inherent incidents of confinement . . . ." *Bell* v. *Wolfish*, 441 U.S. at 537 (emphasis added). This solemn observation forms the very core of the central issue before this Court. When a person is confined for committing a crime, he surrenders his privacy.

This loss of privacy is not a matter of punishment. It is an imperative which stems from the interrelated correctional necessities of controlling and protecting inmates. Nothing less can effectively muzzle the predators and protect the prey. Nothing less can ameliorate the intrinsic dangers of prison life. Accordingly, it is now time for this Court to draw a "bright line" which will end the confusion among the lower courts; it is time for this court to hold that an inmate has no legitimate expectation of privacy in prison. The Fourth Amendment does not abide in a prison cell.

Furthermore, this Court should reject the ill-conceived notion that the Fourteenth Amendment contains a substantive right to privacy in the search and seizure context. Prior decisions of this Court provide no legal basis for such a novel constitutional doctrine.

[8] *See* p. 18 n.4.

Additionally, even if the Court should find that a limited Fourth Amendment right to privacy exists under the circumstances of this case, the Court of Appeals was plainly wrong in holding that the burden of proof shifts to prison officials whenever an inmate questions the validity of a search. This holding flies in the face of the well-established principle that the person seeking redress initially carries the burden of proof. Such a holding should not be countenanced by this Court.

Likewise, if a limited Fourth Amendment right to privacy obtains in this case, in balancing the minimal privacy interests arguably retained by inmates against the governmental interest in maintaining security, the scales unquestionably tip in favor of prison security considerations.

Accordingly, the judgment of the Court of Appeals below was erroneous and must be reversed.

Respectfully submitted,

TED S. HUDSON, Officer

By: .....
GERALD L. BALILES
Attorney General of Virginia

GERALD L. BALILES
Attorney General of Virginia
WILLIAM G. BROADDUS
Chief Deputy Attorney General
DONALD C. J. GEHRING
Deputy Attorney General
PETER H. RUDY
Assistant Attorney General

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